JUN 7 1956

RICHARD B. WILLEY, CL

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]144

JOHN E. TUCK, MRS. JOHN E. TUCK, E. B. LINK, JR., MRS. J. HILLO HUNT, J. HILLO HUNT, MRS. CLYDE WAFER, CLYDE WAFER, ROY CHANDLER, MRS. ROY CHANDLER, OTTO C. VETTEL, MRS. OTTO C. VETTEL, MRS. J. R. GONZALEZ, ROY C. REVERE, GEORGE C. WARWICK AND MRS. GEORGE C. WARWICK,

Petitioners,

vs.

THE CITY OF EL PASO, TEXAS, JOHN J. [illegible], County Judge of El Paso County, Texas, [illegible], Mayor of the City of El Paso, Texas, and [illegible], RICHARD E. [illegible], [illegible] and [illegible], Aldermen of the City of El Paso, Texas,

Respondents.

Petition for Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas.

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[illegible]

[illegible]

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No._____

JOHN E. TUCK, MRS. JOHN E. TUCK, R. D. LINK, JR., MRS. J. KELSO HUNT, J. KELSO HUNT, MRS. CLYDE WAFER, CLYDE WAFER, ROY CHAMBLISS, MRS. ROY CHAMBLISS, OTTO C. VETTER, MRS. OTTO C. VETTER, MRS. J. M. GONZALEZ, ROY C. BLEVINS, GEORGE C. WARWICK AND MRS. GEORGE C. WARWICK,

Petitioners

vs.

THE CITY OF EL PASO, TEXAS, HUGH J. McGOVERN, County Judge of El Paso County, Texas, TOM E. ROGERS, Mayor of the City of El Paso, Texas, and THOMAS BURNHAM, RICHARD E. FLETCHER, ERNEST PONCE and HAL DEAN, Aldermen of the City of El Paso, Texas,

Respondents

Petition for Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas, it being the highest court of the State in which a decision could be had in this suit, the Supreme Court of Texas having refused by order entered on January 18, 1956, with the notation "No Reversible Error," petitioners' application for writ of error to that court; and the Supreme

Court on March 14, 1956, having overruled petitioners' motion for rehearing on their said application for writ of error to the Supreme Court of Texas; the last mentioned order being the final refusal of the Supreme Court of Texas to take jurisdiction of this suit.

OPINIONS BELOW

The District Court of El Paso County, Texas, Forty-first Judicial District, the court of original jurisdiction in this case, made certain findings of fact and conclusions of law, and entered final judgment in favor of respondents and adverse to petitioners.

The findings and conclusions of the trial court are copied in Appendix A (post 15). The final judgment of that court is copied in Appendix B (post 24).

The opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, *City of El Paso, et al vs. Mrs. John E. Tuck, et al,* 282 S. W. (2d) 764, is copied in Appendix C (post 27).

JURISDICTION

The judgment and decree of the Court of Civil Appeals, Eighth Supreme Judicial District, were made and entered on June 24, 1955, and copy thereof is contained in Appendix D (post 37). Motion for rehearing (no opinion) was denied July 20, 1955. Copy of the order is contained in Appendix E (post 39).

Application for writ of error to the Supreme Court of Texas and motion for rehearing on said application were

refused by the Supreme Court of Texas on January 18, 1956, and on March 14, 1956, respectively. These orders are not reported officially, but they are copied as Appendix F (post 39) and Appendix G (post 40).

The application for writ of error having been refused by the Supreme Court of Texas, and motion for rehearing on said order of refusal having been denied, the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas was the highest court of Texas in which a decision could be had in this case *(Michigan-Wisconsin Pipe Line Co. vs. Calvert, Comptroller of Public Accounts, et al,* 347 U. S. 157, 159-160).

Following the above stated action by the Supreme Court of Texas, petitioners filed a motion in the Court of Civil Appeals requesting that court to postpone issuing its mandate pending action of the Supreme Court of the United States on petitioners' application for writ of certiorari. On April 11, 1956, the Court of Civil Appeals entered judgment granting the motion. Appendix H (post 40).

Jurisdiction of this Court is invoked under the provisions of Section 1257(2), (3), c. 646, 62 Stat. 929, 28 United States Code, 1946 Edition, Supplement III.

It is believed that the trial court and the Court of Civil Appeals have decided a question of law under the due process of law clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Were petitioners denied due process of law in violation of Section 1 of the Fourteenth Amendment to the

Constitution of the United States by the ruling of the County Judge of El Paso County, Texas, without hearing, that petitioners were not, pursuant to a petition prepared, signed and presented in conformity to Texas law, entitled to hold an election for incorporation, as a municipality, of an unincorporated area in which petitioners and other petitioning parties resided, although said County Judge had previously held the petition sufficient; and by the decision of the Court of Civil Appeals (though the point was not presented or heard in the trial court) that the refusal of the County Judge to call an election on said petition was final and not subject to review by any court, notwithstanding the fact that the County Judge did not afford petitioners any opportunity to present evidence, authorities or argument in support of their petition for incorporation of the area in which petitioners reside, and their right to be heard thereon?

2. Were petitioners denied due process of law in violaiton of Section 1 of the Fourteenth Amendment to the Constitution of the United States by the judgment of the Court of Civil Appeals holding that two annexation ordinances (Nos. 1285 and 1301), enacted by the city council of El Paso, were effective to incorporate as a part of the City of El Paso certain adjacent lands owned and occupied by petitioners and other persons, without notice to petitioners, hearing, or the consent of petitioners or other residents of the area annexed?

PROVISION OF THE CONSTITUTION OF THE UNITED STATES INVOLVED IN THIS SUIT

Section 1 of the Fourteenth Amendment to the Constitution of the United States is involved in this suit, and

the parts which are pertinent here are, as follows:

> * * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTES INVOLVED

The statutes of the State of Texas involved are Arts. 966, 1133, 1134, 1136, 1139, 1140, and 1175, subsection 2, Revised Civil Statutes, 1925, and are copied in Appendix I, (post 41).

FACT STATEMENT

The Court of Civil Appeals held that the act of the County Judge of El Paso County, Texas, in refusing to call an election for the incorporation of an area of land in which persons petitioning for incorporation lived and owned property, was a final decision which was not subject to review by any court. The County Judge did not give the petitioning parties a hearing. The point was not presented or decided in the trial court. This ruling of the Court of Civil Appeals has been stressed as error in all subsequent proceedings; and the constitutional question here presented has been pressed in all proceedings in the case.

Section 3a of the charter of the City of El Paso, Texas, provides that, "The city council shall have power by ordinance to fix the boundary limits of the City of El

Paso, Texas, and to provide for the extension of said boundary limits and annexation of additional territory lying adjacent to said city, with or without the consent of the territory or inhabitants annexed;" * * * (Appendix J, post 43).

The charter does not provide for any hearing on the part of persons owning property and residing in the territory to be annexed. In the proceedings in this case to annex territory, the city officials and the District Court and Court of Civil Appeals evidently construed the annexation provision of the city charter to deny the right of a hearing to those parties who would be affected by annexation. The trial court and the Court of Civil Appeals held that enactment of an annexation ordinance by the city council accomplished annexation.

The trial court and the Court of Civil Appeals, in effect, held that land owners and residents of the area to be annexed were not entitled to a hearing on the issue of annexation. The decisions of the city council in matters of this kind were, in effect, made the end of the law, and an affected party whose rights were involved was not entitled to a word in opposition to annexation.

This case arises out of an attempt by petitioners to incorporate as a municipal corporation an area of 25.5 square miles adjacent to the City of El Paso, Texas, and out of the attempt by the city council of the City of El Paso, Texas, to annex to said city an area of 32.9 square miles, which includes the 25.5 square mile area. The sequence of events and the history of the litigation in the state courts, is as follows:

The necessary petition for incorporation was filed with the County Judge of El Paso Coun[illegible], seeking to obtain

such election for incorporation (Stipulation, S.F.3; Petitioners' Ex. P-1).

On March 19, 1953, the County Judge found the petition to be sufficient and ordered an election to be held on May 16, 1953, on the issue of the incorporation of the territory adjacent to the City of El Paso, and which the City of El Paso later attempted to annex, resulting in this suit (S.F.4(5); Petitioners' Ex. P-3, Tr. 22).

On April 25, 1953, the County Judge entered another order, referring to his order of March 19, 1953, fixing the place where the election was to be held and appointing the presiding judge (S.F.4(6); Petitioners' Ex. P-4, Tr. 23). The required notices were given (S.F.4(7); Petitioners' Ex. P-5, Tr. 25); the form of ballot was prescribed and the date of May 16, 1953, was set for the election (S.F.4(8); Petitioners' Ex. P-6, Tr. 27); and election officials were appointed (S.F.4(9); Petitioners' Ex. P-7, Tr. 28).

On May 9, 1953, a petition signed by forty-six electors residing within the territory, but not signed by any of the petitioners for this writ of certiorari, was filed with the County Judge asking that the election scheduled for May 16, 1953, be canceled (Petitioners' Ex. P-12; Finding No. 26, Tr. 51).

On November 18, 1954, Ordinance No. 1285, proposing annexation by the city of the territory therein described, was introduced at a meeting of the city council of the City of El Paso. The territory embraced in the ordinance included substantially all of the area described in the petition for the election mentioned in the fifth paragraph above and in addition thereto between four and

five thousand acres of land east of the town of Ysleta, and east of the easterly boundary line defined in the petition for the election. The ordinance was ordered published, and was published in the official newspaper of the city on November 20 and 23, 1954, and was passed by the council on first reading on December 23, 1954 (S.F.5(11); Findings Nos. 11 and 15, Tr. 49, 50; Harper, S.F. 112-113; Hervey, S.F. 208; Wingo, S.F. 236).

On December 8, 1954, a supplemental petition signed by sixty-nine qualified electors residing within the territory described in the petition of March 19, 1953, was presented to the County Judge requesting that he call an election pursuant to the March 19, 1953, petition, which was referred to and made a part of the supplemental petition (Petitioners' Ex. P-13-A; Finding No. 30, Tr. 52).

On December 11, 1954, the County Judge denied the petition and refused to call the election, giving as his reason that between the time he signed an order on May__, 1953, canceling the election called for May 16, 1953, and the presentation to him of the supplemental petition of December 8, 1954, the city council of the City of El Paso had published its intention to annex the area described in the petition for the election "prior by several days to the filing of the Supplemental Petition" (Petitioners' Ex. P-14; Respondents' Ex. D-4-E; Findings Nos. 30, 31, Tr. 52).

On December 23, 1954, Ordinance No. 1301 was introduced at a meeting of the city council of the City of El Paso and ordered published. Publication was made on December 28, 1954 (Stipulation (12), S.F.5; Petitioners' Ex. P-10, S.F.8; Finding No. 12, Tr. 49). This ordinance

includes a substantial part of the area described in the petition for the election but omits some of the territory described in Ordinance No. 1285 (Finding No. 16, Tr. 50).

This suit was for a declaratory judgment, for mandamus requiring the County Judge to call an election for incorporation, and to enjoin the City of El Paso and its officials from taking any further action with regard to the proposed annexation.

Petitioners alleged in their trial petition that the passage of such annexation ordinances would be in violation of the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States (Paragraphs XXV (3) and XXVII, Tr. 12, 13. Copied in Appendix K, post 44).

The trial court found that the petition of March 19, 1953, for an election was still in force and effect, that the electors within the territory described in the petition were entitled to have an election called to determine the question of "Corporation" or "No Corporation", that the filing of the petition operated as an assertion and exercise of jurisdiction prior to that asserted by the City of El Paso by the introduction of either Ordinance No. 1285 or Ordinance No. 1301, and entered judgment accordingly, but denied writ of injunction restraining the City of El Paso, its Mayor and Aldermen from any further proceedings with regard to either of the ordinances, and also denied writ of mandamus to the County Judge commanding him to call the election (Judgment, Tr. 45-47); and decreed that any relief not therein granted was denied.

In the Court of Civil Appeals petitioners (appellees in that court) cross-assigned error to the action of the trial

court in overruling petitioners' proposition that Ordinances Nos. 1285 and 1301 were void as being in violation of the due process of law provisions of the Constitution of the United States, such cross-assignment reading as follows:

"SECOND CROSS-POINT"

> "The court erred in overruling and in failing to sustain appellees' proposition that Ordinances No. 1285 and 1301 are void, being in violation of the due process of law provisions of the . . . Constitution of the United States of America, because enacted without notice or hearing to appellees before an impartial tribunal or in fact before any tribunal, officer, or official body, and because enacted pursuant to Section 3a of the El Paso City Charter, which makes no provision for notice to, or hearing for, residents and property owners in an area outside the city, which area the city undertakes to annex." (Page 7 of Brief for Appellees).

The above cross-assignment of error is discussed at pages 72-92 of the Brief for Appellees filed in the Court of Civil Appeals.

The Court of Civil Appeals held that refusal of the County Judge on December 11, 1954, to order an election for the incorporation of the territory in issue was a judicial act; that it was final; and that it was not subject to review. The point had not been made in the trial court, and the holding was novel in the jurisprudence of Texas.

On motion for rehearing in the Court of Civil Appeals, petitioners urged that the holding of the Court of Civil

Appeals with respect to the final effect of the refusal of the County Judge to call an election for incorporation of the area which the City of El Paso was attempting to annex amounted to a denial of due process of law secured to petitioners by the Fourteenth Amendment to the Constitution of the United States. (Third and Fifth Grounds, pages 11 and 12 of the motion. Copied in Appendix L, post 46).

In petitioners' application for writ of error to the Supreme Court of Texas petitioners urged the error of the Court of Civil Appeals in holding that the action of the County Judge in refusing to hold an election was a valid, non-reviewable determination because such action was taken without any hearing and was therefore in violation of the due process of law provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (Fourth, Fifth and Seventh Points, at pages 9 and 10 of the application. Copied in Appendix M, post 47). These Points are discussed at pages 47-71 of the application for writ of error.

In petitioners' motion for rehearing in the Supreme Court of Texas the same propositions were again urged under paragraphs IV, V, and VII appearing at pages 5 and 6 of the motion. These paragraphs are copied in Appendix N, (post 48).

REASONS FOR GRANTING WRIT OF CERTIORARI

1. Petitioners were denied due process of law under the Fourteenth Amendment by the refusal of the County Judge to accord them a hearing on their right to have an election called pursuant to the petitions filed with him on March 19, 1953, and December 8, 1954.

Petitioners, by filing their petition on March 19, 1953, for an election to be held on the issue of the incorporation of the area described in the petition, secured to themselves under Texas law, the petition being sufficient, an absolute right to have an election called pursuant to the petition. This right was supplemented by the supplemental petition for election filed on December 8, 1954. The right was a continuing one.

Under Texas law the authority first moving to incorporate an area or to annex an area to an existing city or town has the right to retain jurisdiction until the issue is concluded, and a co-ordinate authority may not interfere with the authority first acting *(City of Houston vs State ex rel. City of West University Place,* 142 Tex. 190, 176 S.W. (2d) 928; *Beyer vs Templeton,* 147 Tex. 94, 212 S.W. (2d) 134; *State ex rel. George vs Baker,* (Com. Appl.) 40 S.W. (2d) 41; *State ex rel. Binz vs City of San Antonio,* 147 S.W. (2d) 551 (Writ refused); *Handley vs Coker,* 248 S.W. (2d) 814 (Writ refused). The law does not prescribe a time limit for completing an annexation or for completing incorporation of an unincorporated area. In *City of Terrell Wells vs City of San Antonio,* 216 S.W. (2d) 657 (writ refused), the proceedings were initiated on August 9, 1945; the annexation ordinance was finally passed on March 8, 1947. The court held that the delay in finally passing the ordinance would not render the action void and subject to collateral attack. The act of the City of El Paso in enacting the annexation ordinances of November 18, 1954 and December 23, 1954 was a collateral attack on the annexation petition filed on March 19, 1953, and the supplemental petition filed on December 8, 1954.

Petitioners had established certain rights by the filings which they made, and it was a denial of due process of

law secured to petitioners by Section 1 of the Fourteenth Amendment to the Constitution of the United States for the County Judge and the State courts to deny to petitioners the right to a hearing on this right for an elecetion to be held pursuant to the two petitions.

2. Petitioners, having filed their petition and supplemental petition, secured to themselves a legal right to an election on the issue of incorporation; and their petition having given them a prior right over the City of El Paso, it was a denial of due process of law on the part of the Court of Civil Appeals to deny to petitioners the right to a hearing before either the County Judge or the governing body of the City of El Paso on petitioners' application of March 19, 1953, and December 8, 1954.

3. The provisions of Section 3a of the charter of the City of El Paso, as construed and applied in this case, purport to authorize by ordinance the extension of the boundary limits of the city and the annexation of territory lying adjacent to the city without a legislative determination that benefits will accrue to such area from annexation and without according a hearing to the inhabitants of such added or annexed area. The purported annexation ordinance having been adopted without according a hearing to the residents of the area proposed to be annexed and the attempt to subject the area in issue to the burdens incident to the operation of city government amount to a denial to petitioners of due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (*Browning vs Hooper*, 269 U.S. 396, 405-406).

4. The County Judge's action in refusing to hold an election after being legally petitioned so to do was an ex

parte proceeding. He held no hearing, and no opportunity was afforded petitioners to present evidence, legal authority or argument. He thereby prejudiced and condemned petitioners in their rights and made them and their properties subject to annexation by the City of El Paso merely by the passage of an annexation ordinance by the city council.

In *Riverside Mills vs Menefee,* 237 U.S. 189, 193 this Honorable Court held that to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment. This fundamental rule has been repeated many times *(Mullane vs Central Hanover Trust Co.,* 339 U.S. 306; *City of New York vs N. Y. N. H. & H. Rr. Co.,* 344 U.S. 293, 296; *Coe vs Armour Fertilizer Works,* 237 U.S. 413, 424; *Security Trust Company vs Lexington,* 203 U.S. 323, 333; *Tumey vs Ohio,* 273 U.S. 510, 523, 531).

CONCLUSION

For the reasons set forth above, it is submitted that this petition should be granted and writ of certiorari issued; and petitioners pray for that relief.

Respectfully submitted,

DAN MOODY,
Capital National Bank Bldg.,
Austin, Texas,

J. F. HULSE,
First National Building,
El Paso, Texas,

Attorneys for Petitioners.

APPENDIX A

Findings of Fact and Conclusions of Law of the Trial Court

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
FORTY-FIRST JUDICIAL DISTRICT

MRS. JOHN E. TUCK, et al
Relators and Plaintiffs

vs.

HUGH J. McGOVERN, County Judge of El Paso County, Texas, et al,
Respondents and Defendants

No. 81,122

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court upon request made by Respondents and Defendants makes and files Findings of Fact and Conclusions of Law in the above styled and numbered cause, as follows, towit:

FINDINGS OF FACT

1. All Relators and Plaintiffs were and are residents of the territory described in Plaintiff's Exhibit 1 (P.1) and were and are, qualified electors, and are fairly representative of all other persons similarly situated who are opposed to the annexation of the territory described in said Plaintiff's Exhibit 1 (P.1) but who are so numerous as to make it impracticable to bring them all before the Court.

2. The allegations contained in paragraph II and III of the amended petition describing the defendants in this case are true and correct.

3. Plaintiff's Exhibit 1 (P.1) is the petition for election presented to the County Judge of El Paso County, Texas, on or about March 19, 1953, and all signers thereof were qualified to sign said petition.

4. The plat that accompanied said petition Plaintiff's Exhibit 1 (P.1) is of record in the front of Volume 662, of the Deed Records of El Paso County, Texas.

5. Exhibit "B" to the amended petition is a true and correct copy of the election order signed by the County Judge of El Paso County, Texas, on March 19, 1953.

6. Exhibit "C" to the amended petition is a true and correct copy of an election order signed by the County Judge of El Paso County, Texas, and filed with the County Clerk of El Paso County, Texas, on April 25, 1953.

7. Exhibit "D" to the amended petition is a true and correct copy of an election order signed by the County Judge of El Paso County, Texas, together with the return thereon by the Sheriff of El Paso County, Texas.

8. Exhibit "E" to the amended petition is a true and correct copy of the order signed by the County Judge of El Paso County, Texas, prescribing the form of ballot to be used at the election therein mentioned, and was filed with the County Clerk of El Paso County, Texas, on April 25, 1953.

9. Exhibit "F" to the amended petition is a true and correct copy of the order signed by the County Judge of El Paso County, Texas, on April 25, 1953, appointing election officials.

10. Exhibit "G" to the amended petition is a true and correct copy of the notice of special election signed by the

County Judge of El Paso County, Texas, together with the return thereon by the Sheriff of El Paso County, Texas.

11. Exhibit "H" to the amended petition is a true and correct copy of Ordinance No. 1285 introduced and ordered published at the meeting of the City Council of the City of El Paso on November 18, 1954, and passed on first reading December 23, 1954. Said ordinance was published in the official newspaper of the City of El Paso on November 20, 1954, and republished on November 23, 1954.

12. Exhibit "I" to the amended petition is a true and correct copy of Ordinance No. 1301 introduced and ordered published at the meeting of the City Council of the City of El Paso on December 23, 1954. Said ordinance was thereafter published in the official newspaper of the City of El Paso on December 28, 1954.

13. Exhibit "J" to the amended petition is a true and correct copy of a resolution adopted by the city Council of the City of El Paso at the meeting held on December 23, 1954.

14. At the meeting of the City Council of the City of El Paso held on May 7, 1953, the following motion was made and carried:

> "Motion made, seconded and carried that there be spread upon the minutes a statement that this City Council has no plans or intentions for further annexation of the Lower Valley at this time."

Said motion appears of record in Minute Book 0-3, page 99, of the minutes of the City Council of the City of El Paso.

15. The territory described in Ordinance No. 1285 (Exhibit "H" to the amended petition) includes the territory described in Plaintiff's Exhibit 1 (P.1).

16. The territory described in Ordinance No. 1301 (Exhibit "I" to the amended petition) includes a substantial part of the territory described in Plaintiff's Exhibit 1 (P.1) but omits some of the territory described in Ordinance No. 1285.

17. According to Section 3a of the Charter of the City of El Paso, Ordinance No. 1285 may be passed on second and final reading by the City Council of the City of El Paso at any time, unless abandoned.

18. According to Section 3a of the Charter of the City of El Paso, Ordinance No. 1301 may be passed on first reading by the City Council of the City of El Paso on February 3, 1955, or at any time thereafter, and may be passed on second and final reading subsequent to such date, unless abandoned.

19. Section 3a of the Charter of the City of El Paso is correctly quoted in Paragraph XXVI of the amended petition.

20. The City of El Paso has outstanding bonds in the approximate amount of $7,342,000.00, which are payable out of general revenues of the City.

21. The term of office of the Mayor and Aldermen of the City of El Paso began on April 16, 1953, and is for a period of two (2) years from that date.

22. The persons who signed the petition for election, which is Plaintiff's Exhibit 1 (P.1) in this cause, and

each of them, did not, and have not, asked for their respective names to be withdrawn from said petition for election; and they did not and have not requested said petition for election to be withdrawn or cancelled, or otherwise terminated.

23. The petition for an election filed with the County Judge of El Paso County, Texas, on March 19, 1953, asking said official to call an election for the purpose of having the qualified voters within the territory described in said petition, vote on the question of "Corporation" or "No Corporation" was not, and has not been, abandoned, but is in full force and effect, and that Relators and Plaintiffs are entitled to have said election called and held to determine such question.

24. The City Council of El Paso, Texas, at the time of the filing of this suit, and at the time of the trial of this cause, intended to pass, prior to April 16, 1955, one or the other of the city ordinances, that is, either Ordinance No. 1285 (Exhibit "H") or Ordinance No. 1301 (Exhibit "I").

25. Pursuant to the petition for election Plaintiff's Exhibit 1 (P.1) filed with the County Judge of El Paso County, Texas, on March 19, 1953, said County Judge directed the election officials appointed by him, to hold said election on May 16, 1953 (Exhibit "B").

26. That on or about May 9, 1953, a petition signed by others than the Plaintiffs and Relators herein, was presented to the County Judge of El Paso County, requesting that the election heretofore set for May 16, 1953, be cancelled.

27. That said County Judge acting upon said request or petition to cancel, issued an order purporting to cancel said election previously set for May 16, 1953.

28. That shortly before January 23, 1953, the City of El Paso had annexed Ascarate, which was part of the Ysleta Independent School District. Fear of further reduction in the territory of the Ysleta Independent School District was a factor in causing the filing of a petition to incorporate the City of Ysleta on or about January 23, 1953. After the election date was set, leaders of the incorporation movement wanted the election postponed and among their reasons therefor, was the enactment by the 1953 Legislature of House Bill 129, appearing in Vernon's Civil Statutes 1925 as an amendment to Art. 2804a. On advice of counsel that an election of this character could not be postponed except through a petition to the County Judge to cancel, such a petition was presented and the County Judge did sign an order purporting to cancel the election and immediately thereafter a new petition to incorporate the City of Ysleta was filed (March 19, 1953) and the election set for May 16, 1953.

29. That the motion passed by the City Council on on May 7, 1953, stating that the Council had no plans or intentions for annexation of the Lower Valley "at this time" was put in writing and was read to those present at the Council meeting. But that what the Council meant or intended by the phrase "at this time" was neither clearly understood by the Mayor and Council or those to whom it was read and heard it read. However said Council did not promise not to annex during their term of office.

30. That on December 8, 1954, an instrument denominated as a supplemental petition, signed by 69 qualified voters living in the territory described in Exhibit "A" attached to Plaintiffs' and Relators' Amended Petition

filed herein, was presented to the County Judge of El Paso County, Texas, asking that he set an election pursuant to the petition heretofore filed March 19, 1953, and referred to as hereinbefore, as Plaintiff's Exhibit 1 (P.1).

31. On December 11, 1954, said County Judge, refused to call such an election, giving as his reason therefor that the introduction in the City Council on November 18, 1954, of Ordinance No. 1285 had given the City of El Paso prior and exclusive jurisdiction over said territory. I find that said County Judge did not act fraudulently or arbitrarily but that he did act erroneously upon his bona fide opinion based upon the facts before him at that time.

32. That the area included in the proposed annexation Ordinances 1285 and 1301 is generally urban in character and suitable and proper for annexation to the City of El Paso; that the area defined in said proposed ordinances is substantially the same area as defined in Plaintiffs' and Relators' petition heretofore referred to, Plaintiff's Exhibit 1 (P.1).

33. That said proposed Ordinances 1285 and 1301 would be valid if the prior assertion of authority over such territory by the petition for incorporation of the City of Ysleta filed March 19, 1953, were not still pending and in existence on November 18, 1954, on which date the City of El Paso first asserted its authority over said territory.

CONCLUSIONS OF LAW

1. The method of withdrawing names from a petition filed for incorporation of a territory is not statutory. Nor

is the method for cancelling an election set for incorporation statutory. When Hugh J. McGovern, Jr., County Judge of El Paso County, Texas, accepted and filed on March 19, 1953, the petition for incorporation of the City of Ysleta and fixed the election date for May 16, 1953, his jurisdiction of the matter attached, and the right immediately vested in *all* of the inhabitants of the territory in question to vote at such election. The petition to cancel such election filed with the County Judge on May 9, 1953, and signed by *some* of the inhabitants of the territory in question, could not, and did not, deprive the people of such territory of their right to vote on "corporation" or "no corporation".

2. Relators' and Plaintiffs' right to an election pursuant to their petition Plaintiff's Exhibit 1 (P.1) has never been cancelled or otherwise terminated, nor has such ever been abandoned.

3. That the petition filed with the County Judge of El Paso County, Texas, on March 19, 1953, is still in force and effect and that the Relators and Plaintiffs are entitled to have said official call the election sought by said petition and to make all further orders and take all further action prescribed by the laws of Texas for the conduct of the election, the canvassing of the returns and the entry of the order or orders required by the result.

4. That said petition of March 19, 1953, was, and is, prior in jurisdiction, time and right, over the territory in question, to the jurisdiction asserted by the City of El Paso by the introduction of either Ordinance No. 1285, or as amended by Ordinance No. 1301, on November 18, 1954, and December 23, 1954, respectively.

5. The right to have said election held is prior to the introduction of either Ordinance 1285 or 1301 in the City Council of El Paso, Texas.

6. Ordinances 1285 and 1301 being *proposed* and *intended* legislation, this Court cannot, and does not, declare such intended legislation void.

7. The passage of Ordinances 1285 and 1301 being a legislative act, this Court cannot, and does not, enjoin the passage of said Ordinances, or either of them.

8. The action of the County Judge of El Paso County, Texas, in refusing to call an election pursuant to the request filed therefor on December 8, 1954, having been found by this Court not to have been fraudulent or arbitrary, petition by Relators and Plaintiffs for Mandamus is refused.

9. There is no lack of due process to the inhabitants of the territory in question sought to be annexed, pursuant to decisions by the Supreme Court of Texas, or of equal protection of the laws, under either the Constitution of the State of Texas, or under the Constitution of the United States of America, as asserted in Plaintiffs' and Relators' amended petition filed herein.

Signed March 8, 1955.

(s) Morris A. Galatzan

Judge Presiding

APPENDIX B

Judgment of the Trial Court

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

FORTY-FIRST JUDICIAL DISTRICT

MRS. JOHN E. TUCK, et al,
Relators and Plaintiffs,

vs. } **No. 81,122**

HUGH J. McGOVERN, County Judge of El Paso County, Texas, et al,
Respondents and Defendants,

JUDGMENT

BE IT REMEMBERED that on the 20th day of January, 1955 at a regular term of this Court came on regularly to be heard the above styled and numbered cause, the parties appearing in person and by their attorneys and announcing ready for trial.

A jury being waived, the Court heard all matters of fact and of law, the trial proceeding from day to day until January 24, 1955. The Court reserved ruling on the plea in abatement and special exceptions of respondents and defendants until conclusion of the evidence. The Court being of the opinion that the plea in abatement and special exceptions should be overruled, it is accordingly ORDERED, ADJUDGED, and DECREED that said plea and special exceptions, and each of them, are hereby overruled.

After considering the pleadings, evidence, and argument of counsel, the Court finds that the petition for an

election filed with the County Judge of El Paso County, Texas on March 19, 1953 asking said official to call an election for the purpose of having the qualified voters within the territory described in said petition vote on the question of "Corporation" or "No Corporation" was not and has not been abandoned, but is in full force and effect, and that relators and plaintiffs are entitled to have said election called and held to determine such question.

The Court further finds that the filing of said petition operated as an invocation, assertion, and exercise of jurisdiction over the territory therein described, and that such invocation, assertion, and exercise of jurisdiction was and is prior and superior to the jurisdiction asserted over said territory by the City of El Paso by the introduction of either Ordinance No. 1285 or Ordinance No. 1301 in the City Council on November 18, 1954, and December 23, 1954, respectively.

It is therefore ORDERED, ADJUDGED, DECREED and DECLARED that the petition filed with the County Judge of El Paso County, Texas, on March 19, 1953, is still in force and effect, and that relators and plaintiffs are entitled to have the said official call the election sought by said petition and to make all further orders and take all further action prescribed by the laws of Texas for the conduct of the election, the canvassing of the returns, and entry of order or orders required by the result.

It is further ORDERED, ADJUDGED, DECREED and DECLARED that said petition was and is prior in jurisdiction, time, and right to the jurisdiction asserted by the City of El Paso by the introduction of either Ordinance No. 1285 or Ordinance No. 1301 in the City Council

on November 18, 1954, and December 23, 1954, respectively.

It is further ORDERED, ADJUDGED, and DECREED that the prayer of relators and plaintiffs for writ of injunction restraining the City of El Paso, its Mayor, and Aldermen from any further proceedings with regard to Ordinance No. 1285 or Ordinance No. 1301 be, and the same is hereby, denied; provided, however, this denial is without prejudice to the right of any of the parties hereto to seek further relief in the event of any change hereafter in the facts relative to the matters at issue in this cause.

It is further ORDERED, ADJUDGED, and DECREED that the prayer of relators and plaintiffs for writ of mandamus to the County Judge of El Paso County, Texas be, and the same is hereby, denied; provided, however, this denial is without prejudice to the right of any of the parties hereto to seek further relief in the event of any change hereafter in the facts relative to the matters at issue in this cause.

It is further ORDERED, ADJUDGED, and DECREED that all relief sought by any party and not herein granted is denied.

It is further ORDERED, ADJUDGED, and DECREED that all costs of suit be taxed against the City of El Paso.

To the foregoing judgment the respondents and defendants excepted in open Court and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso; and relators and plaintiffs excepted to the foregoing judgment with respect to the denial of relief sought by them and not granted.

ENTERED this 1st day of February, 1955.

(s) MORRIS A. GALATZAN,
Judge Presiding

APPENDIX C

Opinion of the Court of Civil Appeals

COURT OF CIVIL APPEALS

EL PASO

CITY OF EL PASO, et al,
Appellants,
vs.
MRS. JOHN E. TUCK, et al,
Appellees.

Appeal from the District Court of El Paso County
No. 5116

OPINION

This is an appeal by the City of El Paso from a judgment of the 41st District Court of El Paso County, holding that appellees Mrs. John E. Tuck, et al, were entitled to have an election called to decide whether or not the inhabitants of an area adjacent to the City of El Paso wished to incorporate the said area into a city; that a petition filed for that purpose—alleged by appellants to have been abandoned—on March 19, 1953, was in sufficient force and effect so as to give appellees priority of jurisdiction over the area. The trial court denied appellees' petition for mandamus to compel the county judge to call such election.

The trial court filed findings of fact and conclusions of law substantially as follows:

That shortly before January 23, 1953, the City of El Paso had annexed Ascarate, which was part of the Ysleta Independent School District. Fear of further reduction in the territory of the Ysleta Independent School District was a

factor in forcing the filing of a petition to incorporate the city of Ysleta on or about January 23, 1953. After the election date was set the leaders of the incorporation movement wanted the election postponed, and among other reasons therefor was the enactment by the 1950 Legislature of House Bill 129, appearing in Vernon's Civil Statutes of 1925 as an amendment to Art. 2804 (a). The aforesaid amendment had been the law under which the City of Paso expanded its boundaries. That the Independent School District of the City of El Paso was also expanded therewith, and in the case of the annexation of Ascarate part of the Ysleta School District had been cut off and put into the El Paso District. The amendment to said Art. 2804 (a) had the effect of preventing any further disturbance of adjoining school districts by extension of the City of El Paso's boundaries. On advice of counsel that an election on incorporation could not be postponed except through a petition to the County Judge to cancel, such a petition was presented and the County Judge did sign an order purporting to cancel the election called in pursuance to the petition filed on January 23, 1953, and immediately thereafter a new petition to incorporate the City of Ysleta was filed March 19, 1953, and the election set for May 16, 1953; that the City Council on May 7, 1953, while in conference with some of the leaders of the incorporation movement in Ysleta, passed a resolution, which was:

> "Motion made, seconded and carried that there be spread upon the minutes a statement that this City Council has no plans or intentions for further annexation of the Lower Valley at this time."

That while it was not clear what the Mayor and Council and said leaders from Ysleta understood the resolution to mean, the Council did not promise not to annex the territory comprising Ysleta during the term of office of said

Mayor and Council; that thereafter, on May 9, 1953, a petition signed by approximately forty-six of the original signers of the petition for incorporation, asking the County Judge to cancel the order for election which had been set for May 16th was duly filed, and pursuant to said petition the County Judge did cancel said election order, and no such election was held; that thereafter, on November 18, 1954, the City Council of the City of El Paso introduced ordinance No. 1285 which provided for the annexation of territory which includes the territory described in the petition filed with the County Judge on March 19, 1953; such ordinance was ordered published and was published on November 20, 1954, and republished November 23, 1954. A second ordinance, No. 1301, was introduced at a meeting of the City Council of the City of El Paso on December 23, 1954. Said ordinance was thereafter published, on December 28, 1954. This ordinance was for annexation of practically the same territory as described in the above ordinance except that it did not extend as far east of Ysleta as the territory described in the prior ordinance. On December 8, 1954, an instrument denominated as a supplemental petition, signed by sixty-nine qualified voters living in the territory described in the petition that was filed with the County Judge on March 19, 1953, was presented to the County Judge, asking that he set an election pursuant to the petition theretofore filed on March 19, 1953; that on December 11, 1954, said County Judge refused to call such an election, saying that the introduction by the City Council on November 18, 1954 of Ordinance No. 1285 had given the City of El Paso prior and exclusive jurisdiction over said territory; that the County Judge by such refusal did not act fraudulently or arbitrarily, but that he did act erroneously upon his bona fide opinion based upon the facts before him at that time; that the area included in the proposed annexation ordinances Nos. 1285 and 1301 was a

territory generally urban in character, and suitable and proper for annexation to the City of El Paso; that said ordinances would be valid if the prior assertion of authority over such territory filed in a petition for incorporation of the City of Ysleta on March 19, 1953 was not pending and existing on November 18, 1954; that said proceedings filed on March 19, 1953 had not been abandoned. The trial court further found that there is no lack of due process to the inhabitants of said territory in question, sought to be annexed pursuant to decisions by the Supreme Court of Texas, or of equal protection of the law under either the Constitution of the State of Texas or under the Constitution of the United States of America, as asserted in plaintiffs' petition.

Except for the Constitutional question raised by appellees the principal question involved in this appeal is whether or not the action of the County Judge in refusing to call the election in the absence of his acting fraudulently or arbitrarily is subject to review by either the District Court or the Appellate Courts.

Appellants' Fourth point asserts that the trial court erred in finding that the March 19th, 1953, petition had not been abandoned and was still in full force and effect because the County Judge had held to the contrary, and his decision not being arbitrary or fraudulent is not subject to review.

In passing on the December 8, 1954 petition seeking an election by virtue of the petition filed March 19, 1953, the County Judge refused to call such an election, stating that the City had acquired exclusive jurisdiction over the territory in question, giving as his reasons that the election called for May 16, 1953, pursuant to said March 19th petition, had been cancelled at the request of the petitioners, and

the election never held, and that no further orders had been entered and none were pending at the time the City of El Paso had begun its annexation proceedings.

There seems to be a general rule of law that

> "In passing on petitions for elections and deciding whether or not to call an election, the officer with whom such a petition is filed performs a judicial and not a ministerial function." 29 C.J.S. 92.

In the case of State ex rel Burkett v. Town of Clyde, 18 S.W. (2) 202 (error refused), the County Judge ordered an incorporation election under a statute requiring more than five hundred inhabitants. The incorporation was attacked by quo warranto on the grounds that there were less than five hundred inhabitants in the territory when the election was ordered. The trial court sustained a general demurrer to the quo warranto petition. The Court of Civil Appeals affirmed the trial court's judgment, saying:

> "The duty thus imposed upon the county judge was one of a judicial nature, and the law provided no right to have his decision revised and no procedure for doing so. State v. Goodwin, 69 Tex. 55, 5 S.W. 678. Any judicial action involves the possibility of error. In the absence of a right of appeal or some other method of revision, the courts are powerless to correct error in such action. Applying the principle to the case in hand, we think the proper interpretation of the authorities warrants the conclusion that appellant, by the allegations of its petition, showed no right to have the court determine that there were not more than 500 inhabitants in the territory in question when the election was ordered. State v.

Goodwin, 69 Tex. 55, 5 S.W. 678; Scarborough v. Eubank, 93 Tex. 106, 53 S.W. 573; Word v. Schow, 29 Tex. Civ. App. 120, 68 S.W. 192; State v. Larkin, 41 Tex. Civ. App. 253, 90 S.W. 912; Thompson v. State, 23 Tex. Civ. App. 370, 56 S.W. 603.

"The question naturally arises: Can the county judge, by ordering an election where there are fewer than the requisite number of inhabitants, thus set at naught the law with the effect that redress will be denied to everyone aggrieved by such action? The test of the validity of such action, we think, is good faith on the part of the officer thus charged with the duty. The action of the officer is at all times supported by a presumption that he did what it was his duty to do. If the judge orders such an election, knowing or having good reason to believe that there does not exist the requisite number of inhabitants, his act in doing so would, no doubt, be held to be fraudulent. Unquestionably the law will relieve from the effects of fraud. But even in such case the fraud sufficient to invalidate his action must be such as is chargeable to the officer and not merely fraud of others by which the officer is led into error. Word v. Schow, 29 Tex. Civ. App. 120, 68 S.W. 192." (18 S.W. (2) 203).

This rule has long been in effect, as is well grounded and illustrated by Chief Justice Gaines of our Supreme Court in the Scarborough v. Eubank case supra, decided in 1899, wherein he cites State v. Goodwin, supra, as holding that the court has no right to set aside the finding of the County Judge on an allegation that he erroneously found that the city contained the requisite number of inhabitants, and stating that the action of the County Judge was not subject to review.

The statute under which the territory known as Ysleta seeks to incorporate empowers the County Judge to act upon petitions presented to him for elections, and his findings on the matters involved are final unless he acts fraudulently or arbitrarily. The trial found the County Judge in the instant case did not act fraudulently or arbitrarily, but acted erroneously on the facts before him. While the County Judge did not use the words in his findings that the people of Ysleta had abandoned incorporation proceedings, the effect of his holding was that such proceedings had been abandoned and therefore the City of El Paso's proceedings to annex were prior in time. The trial court and this court are without power to set aside the findings of the County Judge in this case. The County Judge who refused to call the election on the petition filed December 8th, 1954, was the same Judge before whom the first petitions were filed January 23, 1953, and who called an election pursuant to that petition, and who cancelled said election at the request of the petitioners who had filed the original petition asking for an election. It was the same Judge before whom the petition of March 19, 1953 was filed, and who called an election for May 16th pursuant to such petition, and thereafter cancelled said order of election at the request of a large majority of the same petitioners who had signed the petition of March 19, 1953. The Judge himself was in excellent position to know whether or not the proceedings for incorporation had been abandoned, and whether or not he had lost jurisdiction of the matter by the City Council of El Paso having introduced the ordinance of November 18, 1954. The County Judge has shown by his actions that far from acting arbitrarily he has granted every wish of those interested in incorporation, cooperating with them to the fullest extent so far as he could, as long as he considered he had jurisdiction.

The courts have held that in a situation involving a conflict between a city desiring to annex adjacent territory and the inhabitants thereof, the first to take effective action shall prevail. In other words, if the ordinance of the City annexing the territory is first passed, then the City shall have jurisdiction, conversely if the inhabitants of the territory involved file a legal petition with the County Judge seeking to incorporate, then that action takes precedence and the city cannot annex. As was said in a recent decision, the filing of the petition creates a city in embryo.

City of El Paso v. State (Ascarate) 209 S.W. (2) 989;

Beyer v Templeton, 208 S.W. (2) 692, affirmed 212 S.W. (2) 134;

State v Baker, 40 S.W. (2) 41.

So it appears that the County Judge, on the presentation of the December 8, 1954, petition, was confronted with a question of jurisdiction which he had to resolve by deciding a question of fact, namely, had the people of the territory abandoned their effort to incorporate, thus cancelling or rendering ineffective their March 19, 1953 petition calling for an election on the matter of incorporation? If this was so then the City by virtue of its ordinance passed in 1954 would have acquired exclusive jurisdiction of the territory. His ruling or holding indicates that he so found, and that therefore he had no jurisdiction to order the election. The trial court found that he had not acted arbitrarily or fraudulently. In fact, there was never any allegation by anyone nor any evidence that he had. Therefore, on the basis of the authorities cited and quoted above it seems clear that this finding of abandonment by the County Judge, implied though it may be, is not subject to review in the absence

of fraud or arbitrary action. This means that, like the District Court, we here do not have authority to review or pass on the correctness of the County Judge's finding that abandonment had taken place as a matter of fact. We therefore sustain Appellants' fourth point.

Appellant has briefed a total of six points, but it is thought that our disposition of its Fourth point is sufficient to dispose of the matter before us without discussion or disposition of Appellants' other points.

Appellee, by Cross-Point of Error raises a question of the constitutionality of the City's ordinances annexing the involved territory, on the ground that they violate the due process clauses of both State and U.S. Constitution. The constitutional question thus raised in this case deals with the right of the City to annex territory beyond its borders without the consent of the inhabitants. There has arisen a very natural resentment on the part of many groups of people around many cities, as they feel that they are being annexed without the right of voting, a right that has been inherent in American people since the inception of this republic. This is a very natural reaction, and one that has caused much unfortunate misunderstanding. The state of the law in Texas now permits this to be done, and such condition has undoubtedly caused many groups of people and many cities to take precipitate action, when in truth and in fact in some cases the people have not been ready, nor has the city been ready, but each has acted in order to protect what he felt was his just rights.

This court is well aware of this situation, both here in this county and in other parts of the state, as evidenced by the cases on record dealing with this problem. We, however, are constrained and are obliged to follow the rulings

of the Supreme Court of the State of Texas, which court has passed on this question to the effect that the cities do have the right to annex adjoining territories without the consent of the people to be annexed. We have no choice but to follow these rulings that have been laid down by our State Supreme Court. While it is thought by many that the statutes and laws appear to be inadequate, both as to accomplishing the desired results and protecting the rights of the people involved in such situations as we have in this case, the remedy, if any, it appears must be had through our Legislature. We therefore sustain the trial Court's action in overruling appellees' points raising the Constitutional question of lack of due process of law.

> Dallas County Water, etc., Dist. v. City of Dallas, 149 Tex. 362, 233 S.W. (2) 291, cer. den., 340 U.S. 952, 71 Sup. Ct. 571, 95 L. Ed. 766;
>
> City of Houston v. State ex rel. City of West University Place, et al, 142 Tex. 190, 176 S.W. (2) 928, App. Dis. 322 U.S. 711, 64 Sup. Ct. 1159, 88 L. Ed. 1554;
>
> Allen v. City of Austin, 116 S.W. (2) 468, error refused.

It is the duty of this court to follow the decisions already rendered by our state Supreme Court on the question.

Appellees' cross-points 1 and 3 are overruled without discussion.

The judgment of the trial court, insofar as it decrees that the petition of relators and plaintiffs filed March 19, 1953 with the County Judge is still in force and effect, and is prior in jurisdiction to that asserted by the City of El Paso, and

that relators are entitled to have the County Judge call an election, is reversed and rendered, and the judgment of the Court in all other matters is affirmed.

Affirmed in part; reversed and rendered in part.

Per curiam.

Opinon filed
June 24, 1955

APPENDIX D

Judgment of the Court of Civil Appeals, entered June 24, 1955

(Caption and style omitted)

June 24th, 1955.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in that part of the judgment insofar as it decrees that the petition of relators and plaintiffs filed March 19, 1953, with the County Judge is still in force and effect, and is prior in jurisdiction to that asserted by the City of El Paso, and that relators are entitled to have the County Judge call an election, it is therefore considered, adjudged and ordered that part of the judgment be reversed and this Court proceeded to render such judgment in that particular as should have been rendered by the Court below, to-wit:

It is therefore, on this 1st day of February, 1955, ORDERED, ADJUDGED and DECREED by the Court that the relators and plaintiffs, Mrs. John E. Tuck and husband, John E. Tuck, R. D. Link, Jr., Mrs. J. Kelso Hunt and husband, J. Kelso Hunt, Mrs. Clyde Wafer and husband, Clyde

Wafer, Roy Chambliss and wife, Mrs. Roy Chambliss, Otto C. Vetter and wife, Mrs. Otto C. Vetter, Mrs. J. M. Gonzalez, a widow, Roy C. Blevins, and George C. Warwick and wife, Mrs. George C. Warwick, take nothing by their suit against the respondents and defendants, Hugh J. McGovern, County Judge of El Paso County, Texas, The City of El Paso, Texas, Tom E. Rogers, Mayor of the City of El Paso, Texas, and Thomas Burnham, Richard E. Fletcher, Ernest Ponce and Hal Dean, Aldermen of the City of El Paso, to declare the petition of relators and plantiffs filed March 19, 1953, with the County Judge to be still in force and effect, and prior in jurisdiction to that asserted by the City of El Paso, Texas, and they are entitled to have the County Judge call an election, and that as to the same the said respondents and defendants go hence without day.

And because it is the opinion of this Court that there was no other error in the judgment except as herein reversed and rendered in part, it is therefore considered, adjudged and ordered that the judgment of the Court below as herein reversed and rendered in part, be in all other respects affirmed; that the appellees, Mrs. John E. Tuck and husband, John E. Tuck, R. D. Link, Jr., Mrs. J. Kelso Hunt and husband, J. Kelso Hunt, Mrs. Clyde Wafer and husband, Clyde Wafer, Roy Chambliss and wife, Mrs. Roy Chambliss, Otto C. Vetter and wife, Mrs. Otto C. Vetter, Mrs. J. M. Gonzalez, a widow, Roy C. Blevins and George C. Warwick and wife, Mrs. George C. Warwick, pay all costs in this behalf expended and incurred, both in this Court and in the Court below, for all of which let execution issue, and this decision be certified below for observance.

APPENDIX E

Order of Court of Civil Appeals Overruling Motion for Rehearing, entered July 20, 1955.

(Caption and style omitted)

July 20th, 1955.

This day came on to be heard appellees' motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that appellees' motion for a rehearing, be, and the same is hereby, in all things overruled.

APPENDIX F

Order of Supreme Court of Texas Refusing Application for Writ of Error, entered January 18, 1956.

IN THE SUPREME COURT OF TEXAS

MRS. JOHN E. TUCK, et al, **From El Paso County**

No. A-5476. v.

CITY OF EL PASO, et al. **Eighth District**

January 18, 1956.

This day came on to be heard the application of petitioners for a writ of error to the Court of Civil Appeals for the Eighth District and the same having been duly considered, and the Court having determined that the application presents no error which requires the reversal of the judgment

of the Court of Civil Appeals, it is ordered that the application be refused; that the applicants, Mrs. John E. Tuck et al. (all named in the Court of Civil Appeals' judgment) pay all costs incurred on this application.

APPENDIX G

Order of Supreme Court of Texas Overruling Motion for Rehearing, entered March 14, 1956.

(Caption and style omitted)

March 14, 1956.

This day came on to be heard the motion for rehearing of application for writ of error, same having heretofore been submitted to the Court, and after due consideration, it is ordered that the said motion be, and is hereby, overruled.

APPENDIX H

Order of Court of Civil Appeals Postponing Issuance of Mandate, entered April 11, 1956.

(Caption and style omitted)

April 11th, 1956.

This day came on to be heard appellees' motion to postpone issuance of Mandate pending the action of the Supreme Court of The United States on Petitioners' application for a Writ of Certiorari, and the Court having considered the same, is of the opinion that the same should be granted.

Wherefore, it is considered, adjudged and ordered that appellees' motion to postpone issuance of Mandate pending the action of the Supreme Court of The United States on petitioners' application for a Writ of Certiorari, be, and the same is hereby granted.

APPENDIX I

State Statutes Involved

The following are the Texas statutes which are pertinent to the questions involved in this suit:

Chapter 1, Title 28, Vernon's Texas Civil Statutes,

Art. 966. Any city or town containing six hundred inhabitants or over may be incorporated as such, with all the powers, rights, immunities and privileges mentioned and described in the provisions of this title relating to cities and towns, in the manner described in Chapter 11 of this title for incorporating towns and villages, except that the application to become incorporated shall be signed by at least fifty electors, residents of such city or town, and except that when an election is held according to the provisions of such chapter the words "towns and villages" shall be construed to mean "cities and towns." When the entry by the county judge, provided in article 1139 is made with reference to a city or town of six hundred inhabitants and over, such city or town shall be vested with all the rights and privileges of such cities conferred by this title.

Chapter 11, Title 28, Vernon's Texas Civil Statutes,

Art. 1133. When a town or village contains more than two hundred (200) and less than ten thousand

(10,000) inhabitants, it may be incorporated as a town or village in the manner prescribed in Chapter 11, Title 28, of the Revised Civil Statutes of Texas, 1925, and all amendments thereto.

Art. 1134. If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter, shall file an application for that purpose in the office of the county judge of the county in which the town or village is situated, stating the boundaries of the proposed town or village, the name by which it is to be known when incorporated, and accompany the same with a plat of the proposed town or village including therein no territory except that which is intended to be used for strictly town purposes. If any town or village be situated on both sides of a line dividing two counties, application may be made to the county judge of either county in which a portion of said town or village is located, in manner and form as herein provided. A new election shall not be ordered in less than one year.

Art. 1136. If satisfactory proof is made that the town or village contains the requisite number of inhabitants, the county judge shall make an order for holding an election on a day therein stated and at a place designated within the town or village for the purpose of submitting the question to a vote of the people. He shall appoint an officer to preside at the election, who shall select two judges and two clerks to assist in holding it. After a previous notice of ten days, by posting advertisement thereof at three public places in the town or village, the election shall be held in the manner prescribed for holding elections in other cases.

Art. 1139. If a majority of the votes are cast in favor of incorporation the officers holding the election shall make return thereof to the county judge within ten days after the same was held. The county judge shall, within twenty days after the receipt thereof make an entry upon the records of the commissioners court that the inhabitants of the town or village are incorporated within the boundaries thereof; which boundaries shall also be designated in the entry. A certified copy of such entry, together with the plat of the town or village, shall thereupon be recorded in the proper record of deeds of such county.

Art. 1140. When the entry mentioned in the preceding article has been made, the town shall be invested with all the rights incident to such corporation under this chapter, and shall have power to sue and be sued, plead and be impleaded, and to hold and dispose of real and personal property, provided such real property is situated within the limits of the corporation.

Chapter 13, Title 28, Vernon's Texas Civil Statutes,

Art. 1175, subsection 2. The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter.

APPENDIX J

Section 3a of the Charter of the City of El Paso

The City Council shall have power by ordinance to fix the boundary limits of the City of El Paso, Texas, and to provide for the extension of said boundary limits and annexation of additional territory lying adjacent to

said city, with or without the consent of the territory or inhabitants annexed; that upon the introduction of such ordinance in the Council, it shall be published in the official newspaper of the City of El Paso, one time, and shall not thereafter be acted upon until at least thirty (30) days have elapsed after said publication, and when said ordinance is finally passed, said territory so enclosed shall be a part of the City of El Paso and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens of the City of El Paso, and shall be bound by the acts, ordinances, resolutions and regulations of said city. This method of annexing territory shall be additional to the method set out in Section 3 of the Original Charter.

APPENDIX K

Paragraphs XXV (3) and XXVII of Petitioners' Trial Petition

XXV.

(3) Both ordinances were passed on first reading, and one of them will be passed finally on second reading, in violation of the rights of relators and plaintiffs under the equal protection of the law and under the due process provisions of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"

and in violation of the provisions of Section 3, Article I, and of Section 19, Article I, of the Constitution of the State of Texas, which respectively guarantee to everyone the equal protection of the laws, and that no citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land.

XXVII.

Relators and plaintiffs, although represented in the State Legislature by four Representatives and one Senator, chosen at an election in which relators and plaintiffs are eligible to vote, are entirely without representation in the City of El Paso, since they, not being residents of El Paso, cannot vote in city elections. Any purported legislative action by the City of El Paso, through its City Council, affecting plaintiffs by annexing them, their places of residence, and their property to the City of El Paso, is legislation without representation, and is, therefore, in violation of the equal protection of the law, and of the due process clause provisions of Section 3 and Section 19 of Article I of the Constitution of the State of Texas, and of the Fourteenth Amendment to the Constitution of the United States.

In this connection, relators and plaintiffs further allege that said Section 3a of the City Charter of El Paso provides for annexation of adjacent territory with or without the consent of the inhabitants of said territory; that the City has not obtained the consent of said inhabitants, and is proceeding with said annexation ordinances without the consent of the inhabitants of said territory, and with respect to the provision for proceeding without the consent of said inhabitants, the said Charter contains no provision for notice to relators and plaintiffs,

and others similarly situated, of a proposed or pending annexation ordinance, other than publication one time in a newspaper published in the City of El Paso, nor does it provide for any character of hearing for the benefit of relators and plaintiffs, and others similarly situated; nor does it provide in any other manner for a voice in the question of annexation by the residents of the area proposed to be annexed, either by petition, vote, hearing or otherwise, nor does said Section 3a provide for notice and hearing before any impartial body or officer, but on the contrary provides for action by ordinance having extraterritorial effect by a body having an adverse interest, to-wit, the City Council of El Paso, a body in which relators and plaintiffs, as non-residents of the City, have and can have no representation.

APPENDIX L

Third and Fifth Grounds of Petitioners' Motion for Rehearing in the Court of Civil Appeals

Third Ground

This Honorable Court erred in holding that the order of the County Judge, dated December 11, 1954, was a final determination that an election for incorporation of the Town of Ysleta could not be held, and that such determination cannot be reviewed by a District Court, because said action by the County Judge was taken without a hearing, and without opportunity to Appellees to present evidence, legal authorities, or argument, and it, therefore, violates the due process clause of the *Fourteenth Amendment to the Constitution of the United States,* and is void.

Fifth Ground

This Honorable Court erred in holding that the passage of Ordinance No. 1285 or 1301 by the City Council without the consent of the residents of the territory to be annexed, and without notice and hearing pursuant to law, as a matter of right, before an impartial tribunal, being afforded the residents of said territory, does not violate the due process of law provision of the *Fourteenth Amendment to the Constitution of the United States.*

APPENDIX M

Fourth, Fifth, and Seventh Points in Petitioners' Application for Writ of Error to the Supreme Court of Texas

Fourth Point

The Court of Civil Appeals erred in holding that the action of the County Judge on December 11, 1954, in refusing to hold an election for the incorporation of the City of Ysleta was a valid, binding, non-reviewable determination, as said decision was made without any hearing being held by the County Judge, and without his affording Petitioners any opportunity to present evidence, legal authorities or argument, all in violation of the due process of law provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

Fifth Point

The Court of Civil Appeals erred in overruling Petitioners' Point that the action of the County Judge in deciding on December 11, 1954, not to hold said election for the incorporation of the City of Ysleta was void,

because made without having a hearing and without giving Petitioners any opportunity to present evidence, legal authorities, or argument in violation of the due process of law provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

Seventh Point

The Court of Civil Appeals erred in holding that the passage of Ordinance No. 1285 or No. 1301 by the City Council without the consent of the residents of the territory to be annexed, and without notice and hearing pursuant to law, as a matter of right, before an impartial tribunal, being afforded the residents of said territory, does not violate the due process of law provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

APPENDIX N

Paragraphs IV, V, and VII of Petitioners' Motion for Rehearing in the Supreme Court of Texas

IV.

The Court of Civil Appeals erred in holding that the action of the County Judge on December 11, 1954, in refusing to hold an election for the incorporation of the City of Ysleta was a valid, binding, non-reviewable determination, as said decision was made without any hearing being held by the County Judge, and without his affording petitioners any opportunity to present evidence, legal authorities or argument, all in violation of the due process of law provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

V.

The Court of Civil Appeals erred in overruling petitioners' Point that the action of the County Judge in deciding

on December 11, 1954, not to hold said election for the incorporation of the City of Ysleta was void, because made without having a hearing and without giving petitioners any opportunity to present evidence, legal authorities, or argument in violation of the due process of law provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

VII.

The Court of Civil Appeals erred in holding that the passage of Ordinance No. 1285 or No. 1301 by the City Council without the consent of the residents of the territory to be annexed, and without notice and hearing pursuant to law, as a matter of right, before an impartial tribunal, being afforded the residents of said territory, does not violate the due process of law provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States.